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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

THE ILLINOIS CENTRAL RAILWAY ET AL.,
APPELLANTS,

v.

THE INTERSTATE COMMERCE COMMISSION,
APPELLEE.

No. 532.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

THE SOUTHERN RAILWAY COMPANY ET AL.,
APPELLANTS.

v.

H. H. TIFT ET AL.,
APPELLEES.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

No. 601.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

ED. BAXTER,
Of Counsel for Appellants.

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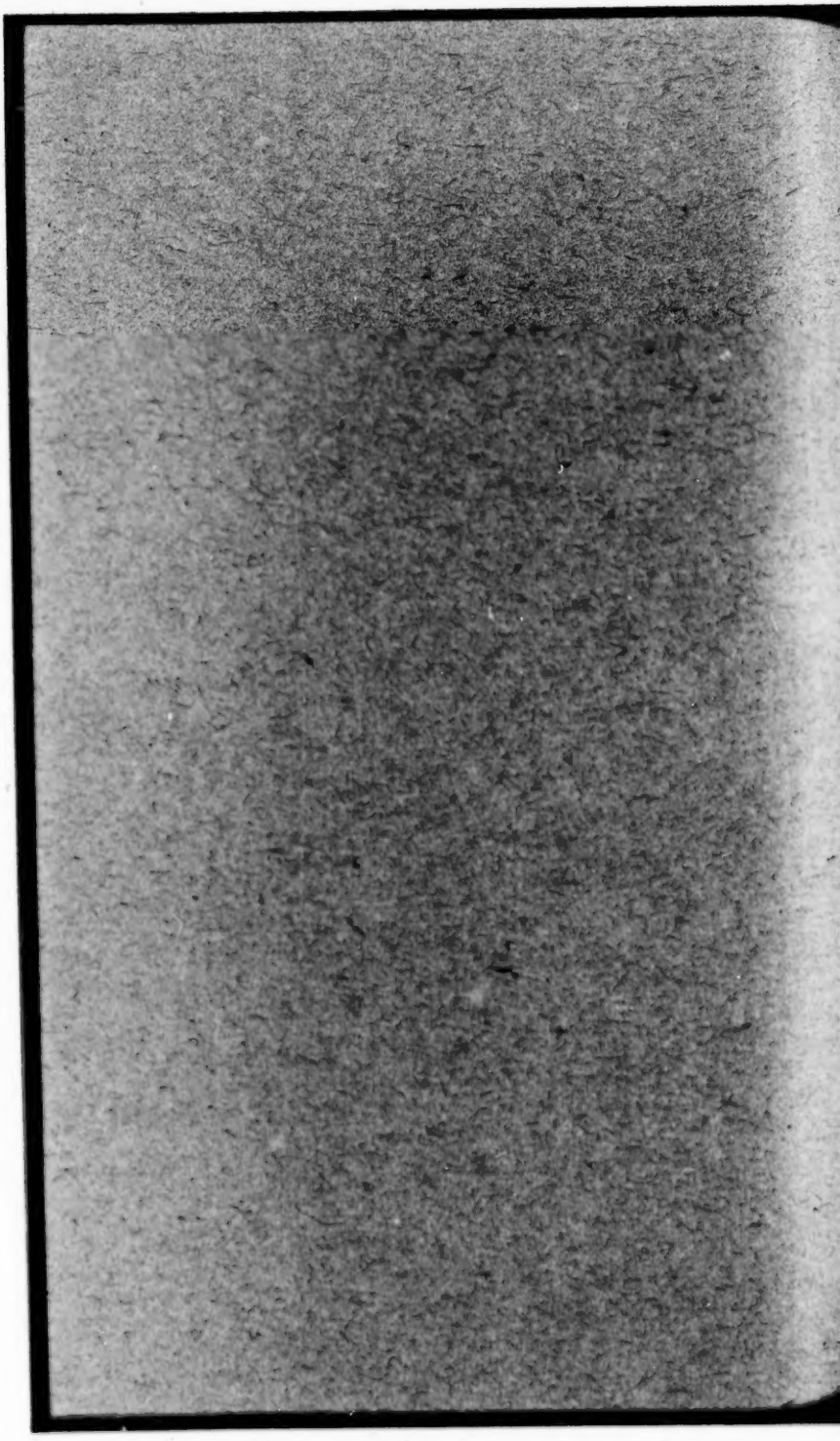

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In the Supreme Court of the United States.

October Term, 1906.

THE ILLINOIS CENTRAL RAILWAY et al.,
Appellants

v.

THE INTERSTATE COMMERCE COMMISSION,
Appellee.

No. 588.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

THE SOUTHERN RAILWAY COMPANY et al.,
Appellants,

v.

H. H. TIFT et al.,
Appellees.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

No. 601.

SUPPLEMENTAL BRIEF OF ED. BAXTER, OF COUNSEL FOR APPELLANTS.

FIRST.

Propositions of Law Involved in these Cases.

Though the first section of the Act to Regulate Commerce provides that all rates shall be reasonable and just (24 U. S. Stat. at Large 279), the Act nowhere defines the meaning of the word "reasonable;" nor does it give any directions as to how either the carriers, or the Commission, or the Courts can ascertain what is a reasonable rate upon a particular commodity.

In Smyth *v.* Ames, 169 U. S. 466, there was involved an entire system of rates, applicable to all traffic on the roads in the State of Nebraska, and this Court in that case laid down certain principles or rules for determining the reasonableness of an entire system of rates applicable to all of the traffic of a railroad in a particular State, viewed from the standpoint of the carrier; but no set of principles or rules has, as yet, been promulgated by this Court to determine the reasonableness of a railroad rate upon a particular commodity, viewed as well from the standpoint of the shipper, as of the carrier.

In the Report and Opinion of the Commission in the above-mentioned case of Illinois Central Railroad Co. *et al.*, *v.* Interstate Commerce Commission, No. 588 (which was known before the Commission as the case of Central Yellow Pine Association *v.* Illinois Central Railroad Company *et al.*), the Commission said:

"While the Supreme Court has undertaken to point out 'certain elements' to be considered in determining the reasonableness of an entire system of rates, it

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has not named any as shedding light upon the reasonableness of a rate on a single commodity like lumber."

10 I. C. Rep., p. 539.

It is entirely safe to say that there are not less than 7,000 articles enumerated in the Official Classification, the rates upon which are shown either in the numbered classes or in special commodity tariffs, and, as conceded by the Commission, this Court has not, as yet, undertaken to point out the principles or rules which are to be considered in determining the reasonableness of the rates charged on any of said classified articles or special commodities.

I respectfully submit that the Act to Regulate Commerce necessarily confers the jurisdiction and imposes the duty upon this Court to formulate from time to time such rules or principles as will enable the carriers, the Commission, and the Courts, to determine the reasonableness of a rate charged upon any of said classified articles or special commodities.

In other words, the jurisdiction and the duty have been conferred and imposed upon this Court to do for the law of transportation what Lord Mansfield did for the law merchant.

The law merchant does not rest essentially for its character and authority on the positive institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade, which general convenience and a common sense of justice had established to regulate the dealings of merchants and mariners in all of the commercial countries of the civilized world.

3 Kent Com. p. (2) 13th Ed.

Before the time of Lord Mansfield, we find that in

courts of law all of the evidence in mercantile cases was thrown together; they were left generally to a jury; and they produced no general principle.

From that time, the great study was to find some certain general principles, which should be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future.

Lord Mansfield succeeded in establishing such general principles, and for that reason was said to be the founder of the commercial law of England.

Campbell's Lives of the Chief Justices, Cockroft's Ed., Vol. 4, p. 115.

Under the practice before the Interstate Commerce Commission, as was the original practice before juries under the mercantile law, the evidence is all thrown together, and is left generally to the Commission; and the great difficulty has been to find some general principles or rules which shall be known to all mankind, not only to control a particular case which may be under consideration by the Commission or the Court, but to serve as guides in all future cases.

The great work of Lord Mansfield consisted in a codification by him of certain principles of equity, and usages of trade, which general convenience and a common sense of justice had established to regulate the dealings of merchants and mariners in all of the commercial countries of the civilized world; and I respectfully submit that the duty is imposed upon this Court, by the Act to Regulate Commerce, to codify certain principles of equity, and usages of transportation, which the general interest of the public, and of the carriers, and a common sense of justice have established to determine the reasonableness of rates charged for the transportation of a particular commodity.

In the case of T. & P. Ry. Co. *v.* I. C. C., 162 U. S., p. 219, this Court said:

"Whatever would be regarded by common carriers apart from the operation of the statute (*i. e.*, act to regulate commerce) as matters which warranted differences in charge, ought to be considered in forming a judgment whether such differences were or were not unjust."

And I submit that it is equally true that whatever would be regarded by common carriers, and the shipping public, apart from the operation of the statute, as matters which should control in determining the reasonableness of a rate charged upon a particular commodity, ought, as a matter of law, to be considered by the Commission, and the Courts, in forming a judgment as to whether a particular rate upon a particular commodity is or is not unreasonable.

That I am right in my contention that there are certain principles of equity and usages of transportation, which the general interest of the public and of the carriers and a common sense of justice have established to determine the reasonableness of rates charged for the transportation of a particular commodity, is proven by the fact that every one of the counsel for appellees in his argument in these cases, insisted upon certain principles or rules of transportation law which he thought should be applied in these cases, and which he contended had been correctly applied by the Commission in arriving at the result which the Commission reached.

I have not the time in a supplemental brief to discuss the question as to whether the particular principles or rules contended for by said counsel are sound or unsound. It is sufficient for my present purpose to show that said counsel themselves concede that certain rules or principles of transportation law exist, and that they should control the determination of the reasonableness of a rate upon a

particular commodity. Where I differ from counsel is in my contention that this Court has the jurisdiction, and that it is its duty to ascertain and codify in the different cases as they arise from time to time the correct rules and principles which should govern in the decision of this class of cases.

I respectfully submit that the following principles or rules of the law of transportation are sound; that they were involved in the determination of these cases; that they were manifestly ignored by a majority of the Commission in the decision of these cases; and that if they had been applied by the majority of the Commission, the result would necessarily have been different.

I.

Where a rate upon a particular commodity is duly published and filed by a carrier with the Interstate Commerce Commission, the presumption is that it is reasonably low, and the burden is upon the party who insists that it is unreasonably high.

II.

Where a rate from a particular district, to certain territory, upon a particular commodity, such as lumber, is made in competition with other carriers from the same district, and from other districts, carrying the same commodity, to the same territory, the presumption is that such rate is reasonably low, and the burden of proof is upon the party who insists that it is unreasonably high.

III.

Where a rate from a particular district to a certain territory upon a particular commodity, such as lumber, is

as low as, or lower than, the majority of rates charged by other carriers for the transportation of the same grade of lumber, for similar distances in the same and other sections of the country, the presumption is that such rate is reasonably low, and the burden is upon the party who insists that it is unreasonably high.

IV.

Where a carrier has the strongest possible motive to develop and increase the traffic over its line in a particular commodity, and has for a long series of years maintained such rates on said commodity as have induced a large and continuous increase along its line of the number of lumber manufactories, and of the capital invested in the lumber business, the presumption is that the rate charged by such carrier for the transportation of said lumber is reasonably low; and the burden is upon the party who insists that it is unreasonably high.

V.

Where a carrier has for a long period of time so adjusted its rates upon a particular commodity, such as lumber, as to enable it to move with profit to the shipper, whatever the conditions of the market may be, reducing the rates as the market declines, and only increasing them as the market improves, a particular increase is reasonable, if it be shown that the percentage of increase has been greater in the price of lumber than in the rates on lumber.

VI.

Where a carrier's rates upon a particular commodity, such as lumber, have been reduced to meet a market depression, and such reduced rates have been kept in effect

only during the period in which said market depression continued, an increase of said rates made by the carrier after such market depression ceases, and which increase does not cause the increased rates to exceed the rates that were maintained by the carrier prior to said depression, such increase will be presumed to be reasonable, and the burden is upon the party who insists that it is unreasonably high.

VII.

Where the expenditures of a carrier have been necessarily largely increased to meet an abnormal increase in the volume of traffic tendered to it for transportation, and the carrier increases its rates upon lumber and other commodities impartially and without discrimination between them, the presumption is that such increase is reasonable, provided the gross earnings of the carrier yield less than the normal proportion of net earnings; and the burden is upon the party who insists that such increase is unreasonably high.

VIII.

Where the expenditures of a carrier have been necessarily largely increased to meet an abnormal increase in the volume of traffic tendered to it for transportation, and the carrier increases its rates upon lumber and other commodities impartially and without discrimination between them, the presumption is that such increase is reasonable, provided the percentage of increase has been greater in the operating expenses of such carrier than in the rates upon lumber; and the burden is upon the party complaining, to show that such increase in the rates upon lumber is unreasonably high.

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IX.

It is legal and proper for a railroad carrier to charge to ordinary expense account, and against earnings, every item of expense and every part and portion of every item which goes to make the road or any of its apppurtenances or equipments better than they were before, where the cost of such items has been taken from the earnings, and has not been raised upon bonds or issues of stock.

X.

Where a carrier has been compelled by reason of an abnormal increase of traffic tendered to it for transportation to double-track portions of its road, build new side-tracks and stations, increase the strength of its bridges, reduce its grades, straighten its curves, increase the weight of its rails, and to make many other improvements and betterments of a permanent character, in order to meet the demand of the public for increased facilities of transportation, the fact that such carrier has been compelled to make such permanent improvements and betterments in order to meet the demands of the public for increased facilities of transportation should be taken into consideration in determining the reasonableness of an increase made by the carrier in its rates upon lumber and other commodities; and this is so, whether such expenditures, as a matter of book-keeping, should be charged to capital account or to the account of operating expenses of the carrier; and without regard to the fact whether such expenditures have been paid out of the carrier's earnings, or have been provided for by the issuance of bonds and stocks.

XI.

A rate on lumber or any other commodity is profitable,

if it exceeds the cost of movement of that particular traffic; and yet, it may be unreasonably low, if it does not contribute its fair share of operating expenses, taxes and fixed charges.

In my original argument, I have endeavored to show that the foregoing rules or principles of transportation law are sound, and that they should have been applied by the Commission in the determination of the reasonableness of the rates in controversy; and I shall not repeat any of those arguments here. I refer to them now, only for the purpose of illustrating my present contention that there are certain rules or principles of the law of transportation which should be ascertained by this Court from time to time, and codified for guidance not only in these, but in subsequent cases; and if the rules or principles above submitted by me are in any respect incorrect, the Court can substitute for them such other rules or principles as in its opinion are correct; and such substituted rules or principles will serve as guides in the future.

Such rules and principles of transportation as are sound, and should obtain in the determination of the reasonableness of the rates upon particular commodities, are not in any sense matters of fact. They are in every sense as much matters of transportation law, as are the rules and principles codified by Lord Mansfield as constituting the law merchant of England.

In asking this Court to ascertain and determine the rules or principles which should be considered in determining the reasonableness of rates, I am not asking it to assume a jurisdiction altogether novel. As stated above, this Court has already exercised the jurisdiction to ascertain and declare certain rules or principles which should be considered in the determination of the reasonableness of an entire system of rates.

In the case of Interstate Commerce Commission *v.* B & O. R. Co., 145 U. S., 284, this Court declared as a principle or rule of transportation law that "any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge."

In the case of T. & P. Ry. Co. *v.* I. C. C., 162 U. S. 198, this Court declared as a rule or principle of transportation law that "the legitimate interests as well of the carrying companies, as of the traders, and shippers, and consignees, should be considered and that among the circumstances and conditions affecting the transportation of traffic, the existence of effective competition should be considered."

The case last cited has been followed by this Court in the case of I. C. C. *v.* Alabama Midland Ry. Co., 168 U. S., p. 144; in L. & N. R. R. Co. *v.* Behlmer, 175 U. S., p. 648; in E. T. V. & G. Ry. Co. *v.* I. C. C., 181 U. S., p. 1; I. C. C. *v.* L. & N. R. R. Co., 190 U. S., p. 273.

Those cases are referred to merely as showing that this Court has already assumed jurisdiction to ascertain and declare from time to time, as different cases have arisen before it, certain rules and principles of the law of transportation, and that I am not asking the Court to assume a new jurisdiction in this case.

If this Court shall decline the task of determining the various rules and principles of transportation law as they arise, in the cases that may be brought before it, there will be no settled principles of law for the guidance either of the Commission or of the courts; and if the Courts take the position that they will not review any order made by the Commission, it will necessarily follow that the action of the Commission in all cases (the result of which does not amount to absolute confiscation of railroad property) will be left practically to the arbitrary discretion of the Interstate Commerce Commission.

This Court decided in the case of I. C. C. *v.* C. N. O. & T. P. Ry., 167 U. S., pp. 479, 499, that the Act to Regulate Commerce, which was in force when the proceedings in this case were had, did not confer upon the Interstate Commerce Commission the power to make rates for the future; and that the Commission in passing upon the question as to the reasonableness of an existing rate, acts in a quasi-judicial capacity.

If the Court declines to review the opinion of the Commission sitting as a quasi-judicial tribunal in determining the reasonableness of a rate, it will result that the entire interstate revenues of the carriers of this country will, for all practical purposes, be placed under the absolute control of the Interstate Commerce Commission without any substantial relief by appeal or otherwise, and the interstate railroad companies will be the only class of persons in this country who will not be able to obtain the opinion of the courts upon questions of law, which vitally affect their interests.

In the case last cited, the Court said:

"Billions of dollars are invested in railroad properties; millions of passengers as well as millions of tons of freight are moved each year by the railroad companies, and this transportation is carried on by a multitude of corporations working in different parts of the country, and subjected to varying and diverse conditions."
167 U. S. 494, I. C. C. *v.* C. N. O. & T. P. Ry.

It is impossible for the judicial mind to conceive that the vast interests involved in the operation of American railroads are to have no protection from the courts; and that the action of a mere tribunal of first instance is, for all practical purposes, to be absolutely conclusive notwithstanding it may be in direct violation of the well-settled rules or principles of the law of transportation.

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SECOND.

The 14th Section of the Act to Regulate Commerce, as it stood when these proceedings were had, required the Commission to report its findings of fact with its conclusions thereon.

That provision evidently meant that the Commission should find all of the material facts in controversy between the parties and not merely such facts as, in its opinion, might serve to sustain the conclusions, at which the Commission may have arrived.

It is true, the reports and opinions in these cases do contain a "finding of facts;" but it is a finding of only such facts as the Commission supposed would support the conclusion at which it arrived; and it does not pretend to be a complete finding of all the material facts in controversy between the parties.

If the practice contemplated by the act had been pursued as it should have been, its conclusions of law would be plainly separated from its findings of fact, and the correctness of said conclusions of law could readily be reviewed by the courts without going into the matters of pure fact at all. The Commission, however, instead of finding all of the material facts that are in issue between the parties, and then announcing separately its conclusions of law, writes its opinions much after the form adopted by the courts.

Its opinions so commingle matters of fact with matters of law, that it is only by a process of very difficult analysis that a court can determine how much of the report and and opinion of the Commission is matter of fact, and how much is matter of law.

The practice in which the Commission has persisted was justly condemned by Judge Clark at Circuit in the case of I. C. C. *v.* L. & N. R. R. Co., 73 Fed. Rep. 414, 415.

I do not insist that this Court shall read the voluminous testimony contained in these records, but I do most respectfully ask it to lay down the rules or principles of transportation law which are fairly involved in the just determination of these cases, and to remand them to the Commission to be re-examined upon the testimony in conformity with the principles of transportation law to be announced by this Court.

In the case of E. T. V. & G. Ry. *v.* I. C. C., 181 U. S. p. 27, and also in the case of L. & N. R. R. Co. *v.* Behlmer, 175 U. S. 648, this Court said that it would not assume to exert its *original* judgment on the facts where by the statute it was entitled to approach the facts with the aid which must necessarily be afforded by the previous enlightened judgment of the Commission upon such subjects; and those cases were, in effect, remanded to the Commission with directions to re-examine them in conformity with the principles of law, announced by the Court in those cases; and that is precisely what I ask the court to do in these cases.

THIRD.

I do not understand that this Court has ever held that it will not in any case review the action of the Commission even where such action has been approved by the courts below.

In the case of T. & P. Ry. *v.* I. C. C., 162 U. S., p. 235, this Court said:

"If the inquiry had been conducted (by the Commission) on *a proper basis*, we should *not have felt inclined* to review the conclusions so reached."

In these cases, I insist that the inquiry was not conducted by the Commission on a proper basis; because it ignored the principles or rules of transportation law to which I have referred above.

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In the case of C. N. O. & T. P. Ry. *v.* I. C. C., 162 U. S., p. 194, this Court said:

"Where conclusions (of the Commission) have been accepted and approved by the Circuit Court of Appeals, *and we find nothing in the record to make it our duty to draw a different conclusion*, we will not reverse," etc.

I insist in these cases that as the Commission ignored the principles or rules of transportation law above referred to, as shown by the results which it reached in these cases, it is the duty of this Court to draw a different conclusion from that arrived at by the Commission, and remand the cases to the Commission to re-examine the testimony in conformity to such principles or rules of transportation law, as the Court may think applicable to these cases.

FOURTH.

In the above case No. 588, the question involved was as to the reasonableness of the rate on lumber from the Mississippi District to the Ohio River, and in the above case No. 601, the question involved was as to the reasonableness of the rate on lumber from the Georgia District to the Ohio River.

The average distance from lumber shipping points in the Mississippi District to Cairo is 412 miles, and the average distance from lumber shipping points in the Georgia District to Cairo is 739 miles.

10 I. C. Rep., p. 561, Tift *v.* Southern Ry. Co. *et al.*

Under the orders made by the Commission in said cases, the railroads leading from the Mississippi District to Cairo may charge as much for a distance of only 412 miles (viz., 14 cents per one hundred pounds), as the railroads leading from the Georgia district charge for a distance of 739 miles.

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It is a fundamental principle of the law of transportation that, in the absence of competition, rates should increase as the distance increases, and the Commission is guilty of a glaring inconsistency in declaring that a rate which is reasonable for 412 miles is a reasonable rate for a distance of 739 miles.

190 U. S., p. 284, I. C. C. *v.* L. & N. R. R. Co.
181 U. S., p. 23, E. T. V. & G. Ry. *v.* I. C. C.

It is true that the railroads leading from Georgia have since May 17, 1894, accepted as low a rate for a haul of 739 miles to Cairo as the Mississippi railroads have accepted for a haul of only 412 miles to Cairo; but the reason why the Georgia railroads have accepted so low a rate, is not because they have thought such rate reasonable in and of itself, but because competition with the Mississippi lines has forced them either to accept that rate or abandon the traffic altogether.

And the fact that the roads from Georgia have continued to accept down to the present moment as low rates for the longer distance as received by the Mississippi lines for the shorter distance conclusively proves that competition between the Georgia railroads on the one hand, and the Mississippi railroads on the other hand, has not been eliminated by illegal agreements in restraint of trade, and conclusively disproves the finding of the Commission that all competition between these lines has been eliminated.

Fifth.

In the above case of the Southern Railway Co. *et al.*, appellants, *v.* H. H. Tift, *et al.*, No. 601, I understood counsel for appellees to state, in oral argument, that after the appellees had obtained an order from the Interstate Commerce Commission, they filed a petition in the Cir-

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cuit Court which reviewed the successive steps which had been taken in the case before the Court and the Commission, and prayed the Court to grant the relief prayed in the original bill, and I understood them to say that appellants, instead of demurring to said petition, filed an answer thereto. It is true that the appellants did file an answer to said petition, but it was expressly stated in said answer that it was filed, *not waiving the benefit of the demurrer theretofore filed to the original bill* and overruled by the court.

See Transcript in No. 601, Part III, p. 1066.

I have stated on pages 1 to 31 of my original argument, in that case, a correct history of the proceedings in the Circuit Court; and on pages 43 to 56 of said argument I have shown why our demurrer to the original bill should have been sustained.

The chief ground of our demurrer to that bill was that complainants had no existing cause of action when it was filed; and my contention was that the fact that after said bill was filed complainants applied to the Interstate Commerce Commission and obtained an order, could not support the jurisdiction of the court.

It is a well-settled general rule that facts which constitute the ground of a suit must exist at the time the suit is instituted; and if a material defect exists therein at that time, it cannot be supplied by matters which have taken place since the institution of the suit.

2 George (Miss.) 454, Brown *v.* Bank.

1 Paige (Ch. Rep.) p. 158, Campbell *v.* Pettitt.

4 Johns Ch. R. 682, Williams *v.* Brown.

Respectfully submitted,

ED. BAXTER,

Of Counsel for Appellants.

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